No. 11,937

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of Burlingame Products Co., Inc., Bankrupt,

Appellant,

vs.

F. W. MACKAY,

Appellee.

APPELLANT'S REPLY BRIEF.

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In his Reply Brief Appellant has no wish to repeat the substance of his position as set forth in his Opening Brief, and relies on his opening argument to controvert the propositions made by Appellee and in support of Appellant's contention that the Order of the District Court herein should be reversed.

Appellee, in his Reply Brief, controverts Appellant's statement of the case and the facts brought out in the testimony taken before the Referee. Appellant believes that a reading of the testimony (Tr. pp. 35-97) will clearly show the error of such allegation.

THE REFEREE IN BANKRUPTCY HAD JURISDICTION TO MAKE THE "TURNOVER ORDER" UPON APPELLEE.

As to whether or not the Referee had jurisdiction to make the Turnover Order complained of, Appellee has failed to furnish authorities in opposition to the various decisions cited by Appellant in his Opening Brief to the effect that a challenge by adverse claimants to the summary jurisdiction of the Bankruptcy Court must be made prior to the entry of a *final order* by a Referee. As was heretofore stated in Appellant's Opening Brief, which statement, it is believed, is borne out by the Transcript of the Record, Appellee failed to present such a challenge to the Referee before the latter had made his final Order. It was not until Appellee filed his Closing Brief with the District Court that he made such a challenge, and this, as confirmed by the authorities cited by Appellant in his Opening Brief, came entirely too late. Failure of Appellee so to object in a timely manner constituted his consent to the jurisdiction of the Referee.

Appellee now bases his argument that the Referee lacked jurisdiction on the contention that, regardless of whether the jurisdiction of the Referee was challenged before the Referee's final Order was made, the Referee totally lacked the authority to make such Order because of the absence of two conditions essential to the exercise of this power, namely, (1) that the money or property in question must be a part of the bankrupt estate, and (2) that it should be in the possession or under the control of Appellee at the time when the Order for its delivery is made.

The Referee found that the bankrupt corporation is, and at all times since its organization, in truth, has been the Appellee, who, as an individual, has disregarded the substance and/or form of said corporation, and has treated the affairs of said corporation as his own and as a part of his own enterprise. The corporate entity was thus disregarded, and Appellee and the bankrupt corporation found to be one and the same.

It therefore follows from the Findings of Fact and Conclusions of Law of the Referee that any money or property of the bankrupt corporation constitutes an asset of Appellee as an individual, insofar as this bankruptcy proceeding is concerned and, conversely, that any money or property of Appellee is subject to administration in the bankruptcy proceeding up to and including such amount or value as may be necessary to satisfy claims of creditors and expenses of administration of the bankruptcy proceeding.

The first essential requirement to give jurisdiction to the Referee to make such Order is therefore satisfied.

Appellee cites a number of decisions to the effect that a Turnover Order must be based upon proof that the property has been abstracted from the bankrupt's estate and is in the possession of the person proceeded against. This is not the situation with which we are here dealing. No contention is made by Appellant that any property has been abstracted by

Appellee from the bankrupt's estate. On the contrary, the situation is that Appellee and the bankrupt corporation have been found to be one and the same and Appellee has not turned over any of his assets to Appellant as Trustee of the bankrupt estate for administration therein. He has been ordered to do so to the extent required by the Turnover Order of the Referee.

Appellee has never attempted to deny that he has the means with which to satisfy the terms of the Order. In fact, in his Affidavit in response to the Order to Show Cause (Tr. pp. 10-15) he asserts that he has "an income sufficient to supply his wants" and that he has from time to time advanced financial aid to worthy individuals, from which statement it may be assumed that he does have more than just an income sufficient to supply his wants and that he could, if he should be so inclined, continue his practice of advancing financial aid to other worthy individuals in the future. If such assumption be in error, then Appellee is free to so inform the Referee after the latter's Order is affirmed by this Court and the enforcement of its conditions are attempted by the Appellant.

WHEN OBJECTIONS MAY BE INTERPOSED TO THE REFEREE'S LACK OF JURISDICTION IN SUMMARY PROCEEDINGS.

Appellee, on pages 11 and 12 of his Brief, discusses the question of jurisdiction generally in an attempt to disprove the lack of jurisdiction of the Referee.

Among the authorities or rules cited are (1) that want of jurisdiction of the subject matter may be taken advantage of at any stage of the proceeding, and (2) that such objection may be raised for the first time on appeal.

The first statement is subject to the additional condition, insofar as it may relate to the Bankruptcy Court and the facts upon which this appeal is based, that the opportunity to raise the point of want of jurisdiction ceases when the Referee has made his final order.

Cline v. Kaplan, 323 U. S. 97, 89 L. Ed. 97, 65 S. Ct. 155, 57 A.B.R. (N.S.) 195.

This, and other decisions heretofore cited by Appellant in his Opening Brief, also refute Appellee's statement that such objection may be raised for the first time on appeal.

THE REFEREE HAD SUMMARY JURISDICTION TO DISREGARD CORPORATE ENTITY AND HOLD APPELLEE LIABLE FOR CORPORATE DEBTS.

Appellee suggests that only by a plenary suit in equity, and not by any Summary Order of a Referee, could the corporate entity of the bankrupt be disregarded and Appellee held liable for its debts.

But the Referee is a "court of bankruptcy" within the meaning of the Act, Sec. 23, (11 U. S. C. A. Sec. 46) giving such a court jurisdiction of a plenary suit by the Trustee and the Referee has summary

jurisdiction to decide the issues that would be raised if the suit had been such a plenary suit, as distinguished from the present instance of an Order to Show Cause in a summary proceeding, provided that the right to a plenary suit has been waived and both sides have consented to the jurisdiction.

Macdonald v. Plymouth County Trust Co., 286 U.S. 263, 52 S. Ct. 505, 76 L. Ed. 1093, 20 A.B.R. (N.S.) 1.

It is the contention of Appellant that by failing to properly object in a timely manner, Appellee waived his right to a plenary suit on the issues involved herein, and consented to the summary jurisdiction of the Referee to determine such issues.

THE SEPARATE ENTITY OF A CORPORATION MAY BE DISREGARDED.

Appellant, in his Opening Brief, has already dealt with the question of separate corporate entity and the doctrine under which such corporate entity may be disregarded by the courts.

The authorities cited by Appellee on this point do not appear to be in conflict with those cited by Appellant. They merely set forth the general rule that a corporation is an entity separate and distinct from its stockholders. But, as Appellant has heretofore submitted, this general rule is subject to the well recognized and firmly settled exception to this general rule that when necessary to redress fraud,

protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence. Of course, no stockholders of the bankrupt corporation, exist, or ever existed, and no shares of stock of the bankrupt corporation were ever issued.

CONCLUSION.

It is submitted that the Order of the District Court setting aside the Order of the Referee in Bankruptcy directing Appellee to turn over to Appellant his sole individual assets be reversed.

Dated, San Francisco, California,
September 20, 1948.

Respectfully submitted,
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Attorneys for Appellant.